IN THE

Supreme Court of the United States

October Term, 1978

No. 77-1578

BROADCAST MUSIC, INC., *et al.*,

Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC., *et al.*,

Respondents.

No. 77-1583

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,

Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC., *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE ALL-INDUSTRY TELEVISION MUSIC LICENSE COMMITTEE AS *AMICUS CURIAE*

IRA M. MILLSTEIN
767 Fifth Avenue
New York, New York 10022
(212) 758-7800
Attorney for Amicus Curiae
All-Industry Television Music License Committee

Of Counsel:
ALAN J. WEINSCHEL
R. BRUCE RICH
ROGER B. KAPLAN
WEIL, GOTSHAL & MANGES

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BRIEF FOR THE ALL-INDUSTRY TELEVISION MUSIC LICENSE COMMITTEE AS *AMICUS CURIAE*

The All-Industry Television Music License Committee submits this brief as *amicus curiae*, pursuant to Rule 42 of the Rules of this Court, in support of respondent, Columbia Broadcasting System, Inc. ("CBS"), urging affirmance of

the judgment of the Court of Appeals for the Second Circuit.[1] The court of appeals ruled that the blanket licensing arrangements of the petitioners, American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI"), are *per se* unlawful under the antitrust laws and constitute misuse of the copyrights held by those organizations' members and affiliates.[2]

Interest of the *Amicus Curiae*

The All-Industry Television Music License Committee ("Committee") represents the interests of the vast majority of local television stations[3] throughout the country in connection with the procurement of music performance licenses from ASCAP and BMI. The Committee represents, for these purposes, the owners of over 500 of the more than 700 local television stations in commercial operation. The stations represented by the Committee consist of both network-affiliated stations, *i.e.*, stations which receive a major portion of their programming from one or more of the three national television networks ("networks") and stations operating independently of a network.[4]

1. *CBS, Inc.* v. *American Society of Composers, Authors and Publishers*, 562 F.2d 130 (2d Cir. 1977). The opinion of the court of appeals appears as Appendix A to ASCAP's petition for a writ of certiorari.

2. This brief is submitted upon the written consents of all parties, copies of which are filed herewith.

3. "Local television station" as used herein refers to any commercial television station licensed by the Federal Communications Commission, excluding the 15 television stations owned and operated by the three national television networks.

4. Of the approximately 710 local television stations currently in commercial operation, some 610 are network-affiliated and some 100 operate independently.

The blanket licenses successfully challenged below by CBS are identical in essential nature to those which are offered by ASCAP and BMI (to the exclusion of other forms of licenses) to the local television stations. The Committee respectfully submits that the impact of those licenses upon local television stations (including Committee members), which stations' royalty payments constitute ASCAP's and BMI's largest source of revenue,[5] has been even more detrimental than their impact upon the networks and demonstrates even more clearly the pernicious and *per se* unlawful nature of the restraints underlying those licenses.

The antitrust claims of all local television stations (including Committee members) against ASCAP, BMI and their respective members and affiliates are now being litigated in a class action in the Federal District Court for the Southern District of New York.[6] The stations reluctantly resorted to the self-help of their own private antitrust action (seeking solely injunctive relief) only when ASCAP and BMI continued in their refusal to offer alternatives to their unlawful blanket licenses.

This *amicus curiae* brief is filed so that the Court may be made aware of the circumstances under which the ASCAP and BMI blanket licenses have impacted upon and become self-perpetuating for virtually the entire television industry. These circumstances, we submit, are relevant to the issues before the Court, for they underscore

5. *See* Petitioners ASCAP Supplemental Brief for Certiorari at 3.

6. *Buffalo Broadcasting Co., et al.* v. *American Society of Composers, Authors and Publishers, et al.*, 78 Civ. 5670 (S.D.N.Y., filed November 27, 1978).

the court of appeals' finding that the purpose and effect of the blanket licenses have been to eliminate price competition, as well as highlight those licenses as classic restraints of trade long held *per se* unlawful by this and other courts.

The ASCAP and BMI repertories contain the copyrighted musical compositions of virtually all American composers, authors and publishers of music. The television networks' blanket licenses with ASCAP and BMI entitle network-affiliated local television stations to broadcast, without further license from ASCAP and BMI, such music in the ASCAP and BMI repertories as may be contained in the network programming carried by the stations.[7] The local television stations must themselves secure (subject to certain minor exceptions) music performance licenses to cover copyrighted music broadcast in non-network programming, *i.e.*, the remaining programming of network affiliates, and all programming of independent stations.

The only licenses offered the local television stations by ASCAP and BMI to cover the music broadcast in the stations' non-network programming have been blanket licenses, which operate in similar fashion to the network blanket licenses. The blanket licenses require the local stations to obtain, and pay for, music performance rights in all of the music in ASCAP's and BMI's respective repertories, without regard to the extent to which such music is needed,

7. The network-affiliated stations' affiliation agreements with the networks provide that approximately 50 percent of the networks' license payments to ASCAP and BMI are to be reimbursed to the networks by the local stations.

desired, or used. Moreover, each local station's payment to ASCAP and BMI under its blanket license is determined by a stated percentage of all revenues derived by that station from all programs covered by the license. Since revenues are most often attributable to factors having nothing to do with the extent or nature of music use in the station's programming, the royalties paid are unrelated to the amount or value to a given station of the ASCAP or BMI music, if any, broadcast.

The cost of music performance rights in the local television stations' non-network programming is accordingly uniquely immune from the competitive pressures of the marketplace. Moreover, music is the only cost element over which the television stations can exercise no control and which they cannot predict in advance (since music performance license fees are computed based on each station's year-end revenue data).

The anticompetitive benefits in the form of elimination of price and other competition among competing copyright proprietors[8] derived by ASCAP, BMI and their respective members and affiliates from the imposition of blanket licenses of the type described were fully recognized by the court of appeals and the licenses were accordingly condemned as *per se* unlawful. This elimination of price and other competition through the device of the blanket licenses becomes yet more apparent when one examines the basis for the organizations' insistence that such licenses, in the case of the local television stations, cover the stations' non-net-

8. *See* discussion, *infra*, in Point C of Argument.

work "pre-recorded" programming[9] as well as the stations' locally-produced (*e.g.*, news and sports) programming.[10] Those reasons are simple. As more fully described below, by so acting, the petitioners have guaranteed the avoidance of competitive mechanisms already in place which would permit free negotiations over performance rights to take place and which would make blanket licenses unnecessary for many—if not most or all—local television stations.

Television performance rights for music contained in pre-recorded programming, which constitutes the major portion of non-network programming,[11] would normally be obtained by the producers of such programming at the same time those producers obtain other rights in the very same musical compositions in direct dealings with individual

9. A "pre-recorded" program as used herein is any motion picture film, video tape or other recorded or transcribed work created for, or otherwise capable of being broadcast on, television.

10. Technically, ASCAP and BMI have offered an alternative form of blanket license to the local television stations, under compulsion of consent decrees with the United States. This "per-program" (and, in the case of BMI, "per-programming period") license also covers the entire ASCAP and BMI repertories, but is applied to individual programs (or program periods) utilizing ASCAP and BMI music. Rather than pay ASCAP and BMI a percentage of revenues from all programming, a station choosing a per-program license would have to pay ASCAP and BMI a significantly greater percentage of revenues realized from those programs utilizing ASCAP and BMI music. Because of the disproportionately high levels at which payments have been set by the defendants under the per-program license, and the onerous reporting requirements accompanying its use, virtually no local television stations have entered into this form of blanket license.

11. Generally, all but two to three hours of the typical local television station's daily non-network programming is devoted to pre-recorded programming, which consists of feature movies and a variety of syndicated programs. The remaining two to three hours are devoted to locally-produced programs such as news, sports coverage and talk shows.

copyright proprietors.[12] For without being able to offer those who license the programming the performance rights to the music contained in it (all of the other rights to which programming having been obtained by the producer), the producer would have a product which could not be marketed.

ASCAP and BMI, and their members and affiliates, have instead arranged, through explicit contractual provisions with both the producers and the local stations,[13] and through uniform and undeviating courses of dealing,[14] that such performance rights will not be licensed to the producers "at the source," but, rather, are to be licensed by the local stations. The producers, knowing that the local stations will have obtained blanket licenses to cover such performances, and that there is no point in paying twice for the same rights,

12. The producers must obtain "synchronization" (*i.e.* recording) rights in copyrighted music to permit the use of such music in the sound tracks of the pre-recorded programming. These rights are typically obtained through negotiations with the Harry Fox Agency acting as the copyright proprietors' agent. The producers also obtain rights through such negotiations permitting motion picture theatre (but not television) performances of copyrighted music in motion picture films.

13. The copyright owners' standard contracts with producers of pre-recorded programming, granting synchronization and motion picture theatre performance rights in specified compositions, withhold the grant of performance rights for television, and require instead that the producer provide its programming only to local television stations which have obtained performance licenses.

In addition, the ASCAP and BMI blanket license agreements with local television stations include a provision which obligates the stations to pay for music performance rights even in programming as to which the producer itself may have obtained such rights.

14. The more than 70,000 composers, authors and publishers of music whose works are licensed by ASCAP and BMI all act in a consistent fashion with respect to the licensing of performance rights in pre-recorded programming. That is, all rights other than television performance rights are licensed to producers of such programs.

acquiesce in these arrangements. All negotiation between ASCAP members and BMI affiliates and program producers over such licenses (the only point in time when such competition could exist) is thereby eliminated in favor of the extraction of the price of performance rights as part of the ASCAP and BMI blanket licenses (at a point in time when the music is irreversibly integrated into the pre-recorded program and no competition can take place).

The "splitting" of the licensing of synchronization and television performance rights, facilitated by the existence of the blanket licenses, not only eliminates any possibility of competition in the licensing of television performance rights in pre-recorded programming, but also enables the blanket licenses to become self-perpetuating.

The selection of music in pre-recorded programming is accomplished by the producers by the time they obtain synchronization rights. No bargaining leverage would accordingly remain with a local television station over the price to be paid for performance rights in the same music in any negotiation with individual copyright holders, since those rights would have to be obtained by the station at any price in order for the station to broadcast the programming. Thus, the blanket license becomes the sole available alternative, thereby locking the stations into those licenses and effectively foreclosing competition over performance rights.[15]

15. The "non-exclusive" nature of the ASCAP (but not BMI) blanket licenses (*i.e.*, the theoretical availability of a direct license alternative), repeatedly cited by the petitioners, is readily seen to be illusory by virtue of arrangements such as "splitting," which assure reliance upon the blanket licenses and render direct licensing totally impractical.

Absent the requirement imposed upon the stations of licensing performance rights in non-network pre-recorded programming, the sole remaining programming for which music performance licenses would be necessary for the local stations would be the two to three hours a day of locally-produced programming. Given the minimal use of music in such locally-produced programming,[16] and the stations' ability in any event to select such music as may be used, the stations could feasibly explore alternatives to obtaining blanket licenses from ASCAP and BMI, for example, using music only in the public domain or music specially purchased by (including performance rights thereto) the local station. Such efforts, at present, would be futile and effectively result in double payments for music, since, due to the above-described "splitting" practices, the stations must in any event obtain, and pay for, blanket licenses covering all of their programming.

Through these practices, ASCAP, BMI, and their members and affiliates have both eliminated competition in the conferral of performance licenses in music in pre-recorded programming and augmented the coverage of, and ensured the local stations' reliance upon, the ASCAP and BMI blanket licenses. The ability of ASCAP and BMI and their members and affiliates to insulate themselves from competition, to force users into blanket licenses and to extract license fees having little or no relation to the value of that music which is used demonstrates the pernicious and bla-

16. Many such programs, such as news and sports coverage, may use no music at all.

tantly anticompetitive intent and effect of the blanket licenses, and their *per se* unlawful nature.[17]

It understates the case to suggest, as the Government does, that the performing rights societies are capable of engaging in practices which could place users such as the local television stations "in a position that gives performing rights societies, and their members, substantial opportunities to misuse their economic position."[18] The symbiotic relationship between the blanket licenses and the splitting of synchronization and performance rights represents as clear an example of "misuse of economic position" as could be imagined.

The "misuse of economic position" and elimination of price competition which has occurred is made apparent by an examination of the license fees which have been paid by the stations for ASCAP and BMI licenses.

The local television stations have been the single largest source of royalties for ASCAP and BMI, notwithstanding that they are far from the largest users of ASCAP and BMI music. Local television station payments to ASCAP and BMI in 1976 totalled over $40 million[19] and had, by

17. It is indeed ironic that the petitioners' efforts at justification of the blanket licenses revolve around alleged transaction cost efficiencies derived therefrom and the "instantaneous access" to compositions which the licenses provide. *See* Brief for Petitioners ASCAP at 8; Brief for Petitioners BMI at 21-24. In fact, the "splitting" practices not only have the effect of eliminating competition, but further, they *increase* transaction costs and create a need for instantaneous access where none would otherwise exist.

18. Brief for the United States as *Amicus Curiae* at 24.

19. This amount is exclusive of network-affiliated stations' contributions to the networks.

that year, increased by over 56 percent from the levels of payments to those organizations in 1972. Indeed, while payments to ASCAP and BMI were so increasing during this period, the stations' minutes of usage of ASCAP and BMI music were actually declining. These facts constitute a dramatic demonstration of the unresponsiveness of ASCAP and BMI to market forces.

The Committee respectfully suggests that the manner in which the local television stations have been disadvantaged at the hands of the petitioners represents a dramatic affirmance of the soundness of the findings of the court of appeals that the blanket licenses constitute *per se* illegal price-fixing arrangements.

Summary of Argument

The ruling of the court of appeals that the ASCAP and BMI blanket licenses constitute price-fixing arrangements, *per se* unlawful under the Sherman Act, was correct and should be affirmed. That opinion is consistent with earlier precedents in this and other courts dealing with price-fixing arrangements generally and with ASCAP's and BMI's blanket licenses in particular.

Examination of the purpose and effect of the ASCAP and BMI blanket licenses, as evaluated by the court of appeals, and as reinforced by the impact of those licenses on local television stations, affirms the soundness of the lower court's ruling.

The petitioners' efforts to justify their activities under the "rule of reason" represent an impermissible attempt to eviscerate cardinal principles relating to the treatment

of price-fixing activities under the antitrust laws. The Government's position that the petitioners' activities should be evaluated under the rule of reason is equally at odds with this Court's and the Government's own prior pronouncements with regard to the proper treatment of price-fixing arrangements.

ARGUMENT

The ASCAP and BMI Blanket Licenses Are *Per Se* Unlawful.

A. The Opinion Below

The Court of Appeals for the Second Circuit ruled that the ASCAP and BMI blanket licenses constitute *per se* unlawful price-fixing arrangements under the antitrust laws of the United States.[20] In reversing the district court's dismissal of the Complaint,[21] the court of appeals emphasized the fundamental principle that

> "... when any group of sellers or licensors continues to sell their products through a single agency with a single price, competition on price by the individual sellers has been restrained." 562 F.2d at 136.

The court properly reasoned that

> "... even if the single price is *reasonable*, the determination of how much each copyright owner gets from the common pot is an artificial fixing of the price to

20. *CBS, Inc.* v. *American Society of Composers, Authors and Publishers*, 562 F.2d 130 (2d Cir. 1977).

21. *CBS, Inc.* v. *American Society of Composers, Authors and Publishers*, 400 F. Supp. 737 (S.D.N.Y. 1975). The opinion of the district court appears as Appendix B to the ASCAP petition for a writ of certiorari.

> that member of the combination for his composition. His distributive share of the common royalties may be greater than the royalty he would receive in a free market. In such case, even if the members of the combination are willing not only to join in the blanket license, but also to sell their individual performing rights separately, the combination is nevertheless a 'combination which tampers with price structures [and therefore] engage[s] in an unlawful activity.' *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 221, 60 S.Ct. 811, 843, 84 L.Ed. 1129 (1940).
>
> "There is no doubt that when ASCAP issues a blanket license, the royalty received by the individual writer or publisher is the result of at least the threshold elimination of price competition for the performing rights in his own particular composition. . . ." *Id.* (emphasis in original).[22]

In reaching its result, the court of appeals followed an appropriate and traditional analytical framework. In holding, after a review of the record, that "[t]he blanket license dulls [the copyright owners'] incentive to compete," *id.* at 139, the court made the very judgment about "the competitive significance of the restraint," *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 692 (1978), that this Court has stated is required under the Sherman Act.

In *Professional Engineers*, it was recognized that the proper analysis—an initial evaluation of the competitive significance of the restraint—is not altered whether the court undertakes a *per se* or rule of reason analysis. 435

22. The court also concluded that the aforedescribed pooling of rights and revenues by ASCAP and BMI constituted copyright misuse. *Id.* at 141 n.29.

U.S. at 690-92. It is accordingly clear that, in first analyzing the restraint and then concluding that it was *per se* unlawful price-fixing, the court of appeals performed precisely the analysis mandated by *Professional Engineers*.

The court of appeals' conclusion that the blanket licenses were properly condemned as price-fixing is consistent with earlier views of this and other courts as to the legality of those activities. The efforts by both petitioners and the Government somehow to exempt the challenged activities from price-fixing doctrine reflect nothing other than attempts to repudiate these settled principles.

B. General Principles Relating to Price-Fixing

This Court has long recognized that agreements among competitors to fix or stabilize prices, to eliminate or limit price competition, or otherwise to tamper with the pricing process are *per se* unreasonable and thus unlawful under Section 1 of the Sherman Act. *United States* v. *Container Corp.*, 393 U.S. 333 (1969); *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1 (1958); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *United States* v. *Trenton Potteries Co.*, 273 U.S. 392 (1927).

The "nature and necessary effect" of such arrangements are so inherently anticompetitive that "no elaborate study of the industry is needed to establish their illegality." *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 692 (1978). *See also Northern Pacific Railway, supra*, 356 U.S. at 5 (price-fixing agreements are illegal *per se* because of their "pernicious effect on competition and lack of any redeeming virtue").

Under this analysis, as the court below recognized, it matters not that the prices set by agreement may be "reasonable." *See Trenton Potteries, supra*, 273 U.S. at 397 ("[t]he reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow"). *See also Socony-Vacuum, supra; United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899). Nor is it relevant to the disposition of such cases that the agreement may have permitted some forms of price competition to continue. *See Container, supra*, 393 U.S. at 337; *Socony-Vacuum, supra*, 310 U.S. at 224-26 n.59.

Finally, a "fixed" price pursuant to agreement need not take the form of a specific, established price. All that is required is that the agreement "tampers," "interferes with," or "chills" the setting of prices by free market forces. *Professional Engineers, supra*, 435 U.S. at 692; *Container, supra*, 393 U.S. at 337;[23] *Socony-Vacuum, supra*, 310 U.S. at 223.

As the *per se* rule implies, it is entirely inappropriate to analyze any purported justifications for a price-fixing scheme, once it has been determined that the activity involved does, in fact, constitute price-fixing. In *Socony-Vacuum, supra*, 310 U.S. at 226 n.59, this Court noted that

> "Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy."

23. As this Court emphasized in *Container*: "Price is too critical, too sensitive a control to allow it to be used even in an informal manner to restrain competition." 393 U.S. at 338.

See also Container, supra, 393 U.S. at 337; *Trenton Potteries, supra,* 273 U.S. at 397-98. Thus, "rule of reason" analyses are inappropriate as to any arrangement tampering with price competition.[24]

This Court has made equally clear that whatever the standard for evaluating particular conduct—*per se* or rule of reason—"the purpose of the analysis is to form a judgment about the competitive significance of the restraint," and "not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry." *Professional Engineers, supra,* 435 U.S. at 692. Since the earliest days of the Sherman Act, it has been held impermissible for the courts to second-guess the validity of the fundamental premise embodied in the Sherman Act, that "the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress." *Northern Pacific Railway, supra,* 356 U.S. at 4. Such an analysis is not an undertaking for the courts, by "judicial legislation," or otherwise. *United States* v. *Trans-Missouri Freight Ass'n,* 166 U.S. 290, 340 (1897).

It is therefore impermissible for a court to attempt to legitimize restraints of trade based on its view that the

24. The contrasting treatment to be accorded price-fixing, as opposed to other types of agreements, was made clear most recently in *Continental T.V., Inc.* v. *GTE Sylvania Inc.,* 433 U.S. 36 (1977), where this Court, although holding that vertical territorial and customer restrictions should be analyzed under a rule of reason, nevertheless emphasized:

> "[W]e are concerned . . . only with non-price vertical restrictions. The *per se* illegality of price restrictions has been established firmly for many years and involves significantly different questions of analysis and policy." *Id.* at 51 n.18.

underlying legislation is unwise, *Standard Oil Co.* v. *United States,* 221 U.S. 1, 65 (1911), or that, "because of the special characteristics of a particular industry, monopolistic arrangements will better promote trade and commerce than competition," *Professional Engineers, supra,* 435 U.S. at 689.

The foregoing principles were most recently reiterated by this Court in *Professional Engineers,* where an association of professional engineers sought to justify an "ethical" rule forbidding its members from submitting competitive bids to prospective customers. The Government contended that the effect of the rule was the elimination of price competition among the members. The association's response was that the rule was aimed at "forestalling the public harm which might be produced by unrestrained competitive bidding," 435 U.S. at 687, and that any restraint on price competition imposed by the rule was justified in order to avoid deceptively low bids, with consequent inferior work and "risk to the public safety and health." *Id.* at 693.

The cornerstone of the Court's analysis was the principle that the antitrust laws "unequivocally foreclose . . . an inquiry into the reasonableness of the prices set by private agreement." *Id.* at 689. Finding that "no elaborate industry analysis [was] required to demonstrate the anticompetitive character of such an agreement," the Court held that "[o]n its face" the agreement to refrain from competitive bidding was a price-fixing arrangement unlawful *per se. Id.* at 692-93. The Court thus rejected out of hand the association's attempt to justify the practice under the

rule of reason, noting that having found price-fixing, "[the] Court has never accepted" an argument that it can be justified under a rule of reason because of threats to public safety or the ethics of a profession. *Id.* at 694. Such efforts at justification, according to the Court, amount to "nothing less than a frontal assault on the basic policy of the Sherman Act." *Id.* at 695. Said the Court:

> "The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers. Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad." *Id.*

C. The ASCAP and BMI Blanket Licenses Are Price-Fixing Arrangements.

The application of the foregoing principles to the activities of ASCAP, BMI and their respective members and affiliates demonstrates that the blanket licenses offered to the networks, the local television stations, and other users, constitute *per se* unlawful price-fixing agreements. The district court,[25] in a finding affirmed by the court of appeals,[26] noted that "musical compositions are substantially interchangeable and that for any proposed use there are several, if not scores, of compositions which are equally suitable." In other words, the proprietors of copyrighted

25. *CBS, Inc.* v. *American Society of Composers, Authors and Publishers,* 400 F. Supp. 737, 752 (S.D.N.Y. 1975).

26. *CBS, Inc.* v. *American Society of Composers, Authors and Publishers,* 562 F.2d 130, 136 (2d Cir. 1977).

musical compositions are competitors in the licensing of such compositions to various users.[27]

The contractual arrangements whereby copyright proprietors grant ASCAP and BMI the right to license performance rights to their musical compositions, whereby ASCAP and BMI establish a single price for the licensing in bulk of all the copyright owners' works, and whereby the copyright owners are remunerated based not on the prices the performances of their music would command in the marketplace, but on artificial distribution formulae and the proceeds of the blanket licenses, have the obvious effect (as noted by the court of appeals) of reducing, if not totally eliminating price (as well as other) competition among the individual copyright owners for the licensing of music performances. The arrangement, in such circumstances, is clearly one which "tampers with price structures," *Socony-Vacuum, supra,* 310 U.S. at 221, and "interfere[s] with the setting of price by free market forces," *Container, supra,* 393 U.S. at 337.[28] In these lights, the court of appeals properly noted that the theoretical availability of licenses from individual copyright holders (at least in the case of ASCAP) is irrelevant:

> "[E]ven if the members of the combination are willing not only to join in the blanket license, but also to

27. *See also* Brief for the United States as *Amicus Curiae* at 16 ("ASCAP [and BMI] undoubtedly . . . [are] association[s] composed of persons who otherwise are competitors").

28. Where, moreover, the effect of such licenses is to give the "performing rights' societies, and their members, substantial opportunities to misuse their economic position," Brief for the United States as *Amicus Curiae* at 24, such as the "splitting" of synchronization and performance rights in pre-recorded programming, *see* discussion, *infra,* at pp. 25-27, the pernicious nature of those licenses, and their interference with free market forces becomes all the more evident.

> sell their individual performing rights separately, the combination is nevertheless a 'combination which tampers with price structures [and therefore] engage[s] in an unlawful activity.' *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 221, 60 S.Ct. 811, 843, 84 L.Ed. 1129 (1940)." 562 F.2d at 136.

That ASCAP and BMI may be characterized as "common selling agents" of competitors' products does not alter the conclusion as to the *per se* illegality of the blanket licenses. This is made clear by this Court's decision in *Citizen Publishing Co.* v. *United States*, 394 U.S. 131 (1969), which involved the antitrust legality of a joint operating agreement between two competing newspapers in Tucson, Arizona.

The agreement provided, among other things, for the selling of subscriptions and advertising by a joint operating company, at rates set jointly (including a "combination rate"), as well as for the pooling of all profits realized, pursuant to an agreed-upon ratio.

The Government's brief to the Court[29] argued for the application of the *per se* rule to the agreement in question, on the following grounds:

First, the agreement "plainly resulted in price fixing, since there was a complete delegation of power over advertising and circulation rates to the operating company."[30] Quoting language from *United States* v. *Masonite Corp.*, 316 U.S. 265, 276 (1942), the Government urged that " '[t]he

29. Brief for Respondent, *Citizen Publishing Co.* v. *United States*, 394 U.S. 131 (1969).

30. *Id.* at 22.

> fixing of prices by one member of a group, pursuant to express delegation, acquiescence, or understanding, is just as illegal as the fixing of prices by direct, joint action.' " *Id.*[31]

Second, the Government argued that the agreed-upon, "inflexible ratio by which the joint profits would be distributed" had the effect of "sharply reducing the economic incentive for competing for circulation and advertising revenues." *Id.* at 22-23. Such profit pooling, the Government contended, "destroys every motive for competition." *Id.* at 23. Citing previous cases which had found profit pooling between competitors to be unlawful, *e.g.*, *United States* v. *Paramount Pictures*, 334 U.S. 131, 149 (1948) (" '[c]learer restraints of trade are difficult to imagine' "); *Northern Securities Co.* v. *United States*, 193 U.S. 197, 328 (1904),

31. The *Masonite* case involved patent licensing agreements among competing patent owners whereby one member of the group was vested with the authority to fix prices for the product manufactured by use of the patents. This Court held the fact that the member setting the prices did not consult with the other patent owners to be irrelevant to the finding of illegality. It further held:

> "The power of Masonite to fix the price of the product which it manufactures, and which the entire group sells and with respect to which all have been and are now actual and potential competitors, is a powerful inducement to abandon competition . . . . The power of this type of combination to inflict the kind of public injury which the Sherman Act condemns renders it illegal *per se*. If it were sanctioned in this situation, it would permit the patentee to add to his domain at public expense by obtaining command over a competitor. He would then not only secure a reward for his invention; he would enhance the value of his own trade position by eliminating or impairing competition. That would be no more permissible than a contract between a copyright owner and one who has no copyright, or a contract between two copyright owners or patentees, to restrain the competitive distribution of the copyrighted or patented articles in the open market." 316 U.S. at 281-82.

the Government contended that the arrangement was *per se* illegal. *Id.* at 23.[32]

It is significant to note the Government's response to the defendant newspapers' contention that price-fixing and profit pooling were required in order to enable both newspapers to stay in business. Such an argument, said the Government,

> "amounts to a plea that claims of business necessity can justify *per se* violations of the Sherman Act. Guided by considerations of effective antitrust enforcement, this Court (see *United States* v. *Trenton Potteries Co.*, 273 U.S. 392) has repeatedly declined to entertain such pleas in the past. No reason exists why it should apply a different approach here." *Id.* at 38.

To the argument that certain social benefits would flow from permitting the arrangement to continue (*e.g.*, the fostering of first amendment values through a diversity of news and editorial policies), the Government replied:

> "We do not attempt here to evaluate these conflicting economic and social views, and we do not believe the Court should do so. This Court has repeatedly rejected claims of ruinous competition or even improvement in distribution of a product as justifications for price-fixing, profit pooling, or market allocation agreements. See *United States* v. *Masonite Corp.*, 316 U.S. 265, 276; *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 220-221; *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 597-598. Congress has determined that the free play of economic forces is the best assurance of the allocation of resources to social advantage.

32. The Government further argued that the agreement between the papers not to compete with the operating company, "particularly when coupled with a price fixing arrangement," also was illegal *per se*. *Id.*

> *Northern Pacific R. Co.* v. *United States*, *supra*, 356 U.S. at 4; see *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U.S. 457, 468." *Id.* at 46-47.

This Court adopted the Government's view of the case and held that the joint operating agreement constituted price-fixing, profit-sharing and market division arrangements *per se* unlawful under Section 1:

> "The §1 violations are plain beyond peradventure. Price fixing is illegal *per se*. . . . Pooling of profits pursuant to an inflexible ratio at least reduces incentives to compete for circulation and advertising revenues and runs afoul of the Sherman Act." 394 U.S. at 135.

Indeed, the Court concluded:

> "The joint operating agreement exposed the restraints so clearly and unambiguously as to justify the rather rare use of a summary judgment in the antitrust field." *Id.* at 136.

The relevance of *Citizen Publishing* is clear. The activities there condemned as *per se* unlawful are, upon analysis, of no essential difference from the facts presented by the ASCAP and BMI licensing arrangements. While ASCAP and BMI do not set the price for the licensing of single compositions (since they each refuse to offer such licenses), by offering a blanket license setting one price for all compositions, "price competition among members of ASCAP [and BMI] is eliminated as surely as if the rate for each performance were fixed at the outset."[33]

33. Note, *CBS* v. *ASCAP*: *Performing Rights Societies and the Per Se Rule*, 87 Yale L.J. 783, 784 (1978).

The effect of the distribution of royalties among ASCAP and BMI members and affiliates, moreover, is identical to that perceived in *Citizen Publishing*: the copyright proprietors' incentives to compete are "sharply reduc[ed]"[34] and "dull[ed]"[35] by such an arrangement.[36]

Finally, purported justifications for the common selling agency's price-fixing and profit pooling practices based on alleged industry need or perceived social benefits are, under *Citizen Publishing* (and more recently, *Professional Engineers*), no defense to the *per se* violation which inheres in the arrangement.

The effect, then, of ASCAP's and BMI's blanket licensing arrangements with copyright holders has been to eliminate price competition among individual copyright owners over the performance of their musical compositions within the meaning of the *Container*, *Socony-Vacuum* and *Trenton*

34. Brief for Respondent at 22-23, *Citizen Publishing, supra.*

35. *CBS* v. *American Society of Composers, Authors and Publishers, supra,* 562 F.2d at 139.

36. ASCAP notes that "under the weighting rules which ASCAP has adopted . . . all performances do not earn the same credit. For example . . . 'serious' music is encouraged through a performance weighting system that rewards its composers more generously than composers of popular music." Brief for Petitioners ASCAP at 22n. Thus, remuneration under the blanket licenses may be seen, in addition, not to reflect normal market demand for, *e.g.*, more "popular" music than "serious" music but, rather, artificial distribution formulae among more "deserving" copyright owners. Such a displacement of the laws of supply and demand is the hallmark of any cartel. *See Northern Pacific Railway Co.* v. *United States,* 356 U.S. 1, 4 (1958) ("The Sherman Act . . . rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress . . . ."); *Professional Engineers, supra,* 435 U.S. at 695-96; R. Bork, *The Antitrust Paradox* 44-45 (1977) (hereinafter "Bork").

Potteries line of cases. The teaching of *Citizen Publishing*, moreover, makes clear that a characterization of the pricing restraint as occurring through a common selling agent, rather than through direct price-setting by each of the members and affiliates, or the contention that "business necessity" allegedly compels the arrangement, cannot alter the fundamental illegality of the arrangement.

The fundamentally illegal nature of the ASCAP and BMI blanket licenses, as well as their unlawful purpose, is made all the clearer by an examination of the impact of those licenses on the local television stations. As earlier noted, the predominant portion of the programming for which the local television stations are responsible for obtaining music performance licenses consists of pre-recorded programs. The music contained in such programs is selected not by the local station but by the producer of the programs. The producer engages in negotiations with individual copyright owners for synchronization and motion picture theatre performance licenses to such music. The 22,000 ASCAP members and 49,000 BMI affiliates, in their negotiations with producers, rather than routinely granting television performance rights as well, uniformly withhold such rights, requiring instead that the local television stations obtain the necessary licenses.

The purpose and effect of these arrangements is clear. Since the only forms of license offered by ASCAP and BMI to the local television stations are blanket licenses, these arrangements assure that the local television stations will be required to obtain such licenses. The competition which could otherwise occur between individual copyright holders and producers over television performance licenses

is eliminated in favor of the noncompetitive rewards of the blanket licenses.

This very agglomeration of power through the blanket licenses was condemned by the court in *Alden-Rochelle, Inc.* v. *ASCAP,* 80 F. Supp. 888 (S.D.N.Y. 1948), *relief,* 80 F. Supp. 900 (S.D.N.Y. 1948), where the blanket license, perpetuated and forced on movie theatre exhibitors through the splitting of synchronization and motion picture theatre performance rights, was held to violate both Sections 1 and 2 of the Sherman Act. The very same perpetuation of blanket licenses, with the very same purpose and intent, has occurred in the television industry.

For the local television stations, any hopes of avoiding dealing on ASCAP's and BMI's terms are dashed. Since the music for which the stations must obtain licenses is already selected by the producers, the stations cannot hope to obtain anything approximating competitive prices through individual negotiations for the performance rights to such music. As the Government has aptly noted, any such attempts

> "would create an opportunity for the copyright owners, as a condition of granting performing rights, to attempt to obtain the entire value of the shows 'in the can.' "[37]

Precisely such a shifting of the time of price negotiation was condemned in *Professional Engineers.* There, the association's ban on competitive bidding unlawfully shifted price negotiations from a point in time before selection of an engineer to after his selection (directly analogous to the

37. Brief for the United States as *Amicus Curiae* at 24.

petitioners' shifting of price negotiations over performance licenses to the time after which the music has been selected). Noting that the association "mistakenly treated negotiation between a single seller and a single buyer as the equivalent of competition between two or more potential sellers," this Court condemned such practice as one which " 'impedes the ordinary give and take of the market place,' and substantially deprives the customer of 'the ability to utilize and compare prices in selecting . . . services [or products]'. . . . On its face this agreement restrains trade within the meaning of §1 of the Sherman Act." 435 U.S. at 692, 693 & n.19.

D. ASCAP's and BMI's Blanket Licenses Have Been Roundly Condemned by This and Other Courts.

The view of the court of appeals as to the legality of the ASCAP and BMI blanket licenses is entirely consistent not only with sound principles relating to price-fixing but also with opinions of this and other courts which have previously examined those licenses.

In 1941, in the context of a challenge to the constitutionality of a state statute making it unlawful for owners of copyrighted music to combine to fix license fees, this Court held that ASCAP's practices fell "squarely" within the law's definition of unlawful restraints of trade. *Watson* v. *Buck,* 313 U.S. 387, 404 (1941). To ASCAP's argument that the statute unconstitutionally deprived copyright owners of rights granted them by the copyright laws, the Court responded:

> "We find nothing in the copyright laws which purports to grant to copyright owners the privilege of combining

in violation of otherwise valid state or federal laws." *Id.* at 404.[38]

In 1948, as previously discussed, ASCAP's licensing arrangements were held to violate Sections 1 and 2 of the Sherman Act in *Alden-Rochelle* v. *ASCAP*, 80 F. Supp. 888 (S.D.N.Y. 1948). The court there found that

> "[a]*lmost every part of the Ascap* [*sic*] *structure, almost all of Ascap's activities in licensing motion picture theatres, involve a violation of the anti-trust laws.* Although each member of Ascap is granted by the copyright law a monopoly in the copyrighted work, it is unlawful for the owners of a number of copyrighted works to combine their copyrights by any agreement or arrangement, even if it is for the purpose of thereby better preserving their property rights." *Id.* at 893. (emphasis added)

On the heels of *Alden-Rochelle*, the court in *M. Witmark & Sons* v. *Jensen*, 80 F. Supp. 843 (D. Minn. 1948), denied equitable relief to plaintiff-copyright owners who had asserted copyright infringement claims against motion picture exhibitors who had failed to obtain ASCAP licenses to perform plaintiffs' music. Following the rationale of *Alden-Rochelle*, the court held that ASCAP had violated the antitrust laws and misused its copyrights, rendering them unenforceable.

Blanket copyright licenses were again condemned in *Affiliated Music Enterprises, Inc.* v. *SESAC, Inc.*, 160 F.

38. Justice Black who wrote for the majority in *Watson*, had, in an earlier opinion in the same case, characterized ASCAP's blanket licenses as a "flagrant" price-fixing combination, which required purchasers "to take, at a monopolistically fixed annual fee, the entire repertory of all numbers controlled by the combination." *Gibbs* v. *Buck*, 307 U.S. 66, 81-82 (1939) (dissenting from majority's affirmance of preliminary injunction without passing upon the merits).

Supp. 865 (S.D.N.Y. 1958), *aff'd*, 268 F.2d 13 (2d Cir. 1959), a case which involved claims that another performing rights society had engaged in monopolistic practices in acquiring rights to license public performances from copyright owners. The court described the defendant's blanket license agreements with copyright owners as a "classic pooling of rights and sharing of revenue," citing and relying upon the holdings of *per se* illegality in *Alden-Rochelle* and *M. Witmark*. *Id.* at 875. The court further noted that

> "[t]he advantages derived from collective licenses and the numerous practical difficulties attendant on individual licenses do not absolve collective licenses from the antitrust laws." *Id.*

The ruling of the court below is, therefore, supported both by traditional principles relating to price-fixing arrangements and the application of those principles to ASCAP and BMI by this and other courts.

E. The Purported Applicability of the "Rule of Reason" to the ASCAP and BMI Blanket Licenses

ASCAP and BMI, not surprisingly, and the Government, altogether surprisingly (except, perhaps, in light of its own historically aberrational treatment of this industry) urge that a "rule of reason" test should be applied to the petitioners' blanket licensing practices in order to determine the legality of those practices under the antitrust laws.[39] Upon analysis, the petitioners' and the Government's arguments amount to nothing other than an effort

39. *See* Brief for Petitioners ASCAP; Brief for Petitioners BMI; and Brief for the United States as *Amicus Curiae*.

to create an exception to the *per se* rule against price-fixing, based on the alleged "unique" and "*sui generis*" nature of the music performance licensing industry—an effort which, as a matter of sound policy and adherence to established legal precedent, this Court should not countenance.

1. Petitioners' Rule of Reason Argument

The thrust of petitioners' argument that the *per se* rule is inapplicable to their activities is not so much that these activities, as a matter of fact, do not constitute price-fixing (although this is, of course, asserted); it is, instead, that even if a finding is made that the purpose or effect of the practices is to tamper with (or as BMI would urge, "affect")[40] market prices, the "*sui generis*" nature[41] of the music industry makes appropriate a wide-ranging inquiry into whether, all things considered, the conduct should be condemned. Stated another way, the petitioners contend that the Court should evaluate factors other than the competitive impact of their conduct—in essence, weigh all of the social and economic factors which may have a bearing on the vitality of the market for music performance licenses. Petitioners apparently argue that their blanket license system inevitably arises out of the intrinsic nature of music licensing.[42] In other words, competition among copyright

40. Brief for Petitioners BMI at 20.

41. Brief for Petitioners ASCAP at 27-28.

42. To cite BMI:

"If BMI and ASCAP did not exist, the natural barriers would result in the acquisition of far fewer public performance licenses —with the consequence that users would either perform less music than they would prefer, or perform some music without the licenses necessary to avoid civil and criminal liability. BMI and ASCAP thus exist because they fill a definite and clear market need." Brief for Petitioners BMI at 24.

holders is inimical to music licensing. Even were this astounding assertion true,[43] it would be properly addressed not to the courts but to Congress in support of arguments for legislative immunity from antitrust or appropriate regulation of music licensing. The cases, including those relied on by ASCAP and BMI, simply do not support the kind of expansive *judicial* inquiry envisioned by those organizations.

As earlier discussed, once a court viewing an alleged price-fixing arrangement has determined that the concerted conduct at issue has the purpose or effect of fixing, raising, depressing, pegging or stabilizing market prices (as the blanket licenses unquestionably do),[44] such determination "unequivocally foreclose[s] . . . an inquiry into the reasonableness of the prices. . . ," *Professional Engineers, supra,* 435 U.S. at 689, and the conduct is held to be *per se* unlawful.

As an initial matter, then, it is not the law, as ASCAP and BMI urge, that "any conduct . . . which may improperly affect price" is subject to evaluation under the rule of reason.[45] The cases relied on for this extraordinary proposition either deal with equivocal conduct of uncertain effect on price, where the Court was required to investigate

43. Of course, the assertion is not true. "[There is] nothing in the copyright laws which purports to grant to copyright holders the privilege of combining in violation of otherwise valid state or federal laws." *Watson* v. *Buck, supra,* 313 U.S. at 404. Moreover, even the rule of reason advocated by petitioners "does not support a defense based on the assumption that competition itself is unreasonable." *Professional Engineers, supra,* 435 U.S. at 696.

44. *See discussion, supra,* at pp. 18-27. *See also* Brief for the United States as *Amicus Curiae* at 16-17.

45. Brief for Petitioners BMI at 20.

whether in fact it was dealing with price-fixing (*see, e.g., United States* v. *Citizen and Southern National Bank*, 422 U.S. 86 (1975); *Maple Flooring Manufacturers Ass'n* v. *United States*, 268 U.S. 563 (1925); *Cement Manufacturers Protective Ass'n* v. *United States*, 268 U.S. 588 (1925)); are cases not involving pricing restraints at all (*see, e.g., Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977) and *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1 (1958)); or simply are not supportive of the assertion at all (*see, e.g., National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 692 (1978), where the Court found the agreement to be unlawful "on its face," thus requiring "no elaborate industry analysis"; *United States* v. *Container Corp.*, 393 U.S. 333 (1969) and *Sugar Institute, Inc.* v. *United States*, 297 U.S. 553 (1936), where the Court applied a *per se* rule after determining that the activities constituted price-fixing arrangements).

The further contention that the existence of *sui generis* industry facts warrants the application of a rule of reason standard to price-fixing agreements[46] is equally contrary to the cases. As this Court made clear in *Professional Engineers*, a court's inquiry must be limited to "a judgment about the competitive significance of the restraint," and not a decision as to "whether a policy favoring competition is in the public interest, or in the interest of the members of an industry." 435 U.S. at 692. Accordingly, a court is not at liberty to take a *per se* unlawful agreement out of that category on the ground that "because of the special characteristics of a particular industry, monopolistic arrangements will better promote trade and commerce than competition." *Id.* at 689.

46. Brief for Petitioners ASCAP at 27-28.

No case relied on by ASCAP and BMI supports the view that otherwise *per se* unlawful price-fixing violations may, in the case of unique industry conditions, be scrutinized by the courts to evaluate the efficacy of the competitive model in that industry. No such cases exist. Price-fixing, once identified, is, and has consistently been recognized to be, illegal *per se*.

2. *The Government's Rule of Reason Argument*

The Government's brief properly recognizes that

> "[a]n agreement among competitors to charge a particular price, manufacture a particular quantity, adjust the terms of competition, or otherwise tamper with the price-setting mechanism of the marketplace is unlawful *per se*, no matter how reasonable the price set may be, no matter how ruinous competition otherwise may be, and no matter how legitimate the association otherwise may be."[47]

The Government further notes that, as associations "composed of persons who otherwise are competitors," which offer licenses at prices set by the associations, and which, in so doing, alter "the circumstances under which copyrights are available in the marketplace," the petitioners' arrangements have "important features in common with other arrangements that, this Court has held, are *per se* illegal."[48]

Yet, after acknowledging the clear applicability of *per se* standards to the petitioners' activities, the Government, in violation of its own, and this Court's, previous pronounce-

47. Brief for the United States as *Amicus Curiae* at 14.

48. *Id.* at 16-17.

ments, urges that these practices not be condemned under a *per se* rule since "performing rights societies, and blanket licenses for copyrighted works, do not invariably produce inefficiencies and waste of the sort that should lead to automatic condemnation."[49]

In support of this contention, the Government cites two purported features of the blanket licenses: first, the licenses are said to constitute a separate and "unique" product, "fundamentally different from any license any one of [ASCAP's or BMI's] members [or affiliates] can sell";[50] and second, it is contended that the licenses "achieve substantial efficiencies" beneficial to both users and copyright owners.[51]

There is a sense of *deja vu* in reading the Government's brief and viewing the Government's effort to exempt petitioners from the workings of the *per se* rule. While the Government's rubric for seeking to preserve the petitioners' blanket licenses from condemnation under the antitrust laws has changed slightly from that expressed in its previous submission to this Court in *K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967), *cert. denied*, 389 U.S. 1045 (1968),[52] the fundamental (and wholly impermissible) premise of the Government remains unchanged.

49. *Id.* at 17.

50. *Id.*

51. *Id.*

52. The Government's *K-91* brief appears as the Appendix to the Brief for the United States as *Amicus Curiae* herein.

In *K-91*, the Government, after acknowledging that ASCAP's activities were "subject to charges of illegal pooling and price-fixing,"[53] nevertheless urged that account be taken of the "relevant economic setting" in which ASCAP operates.[54] The Government noted:

> "The extraordinary numbers of users spread across the land, the ease with which a performance may be broadcast, the sheer volume of copyrighted compositions, the enormous quantity of separate performances each year, the impracticability of negotiating individual licenses for each composition, and the ephemeral nature of each performance all combine to create *unique market conditions* for performance rights to recorded music."[55] (emphasis added)

The Government there concluded:

> "If this market is to function at all, there must be—at least with respect to licensing the performance of recorded music—some kind of central licensing agency by which copyright holders may offer their works in a common pool to all who wish to use them."[56]

The Government in the instant case attempts to harmonize its present views with those expressed in *K-91*, by suggesting that the Government's position in *K-91* was merely

53. Brief for the United States as *Amicus Curiae* at 7, on Petition for Certiorari, *K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967).

54. *Id.* at 7-8.

55. *Id.* at 10.

56. *Id.* at 10-11.

that "blanket licenses serve a valuable economic function and therefore should be evaluated under a rule of reason."[57] In fact, and despite its disclaimers, what the Government has sought to do in both cases is have this Court create a glaring escape to price-fixing liability on the grounds that the price-fixing arrangement facing the Court does not "invariably" create inefficiencies and waste, is dictated by "unique" industry circumstances, and is required "if this market is to function at all." Yet, the Government's attempt would undermine the very purpose of the *per se* rule, which has been to avoid

> ". . . the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken." *Northern Pacific Railway Co.* v. *United States,* 356 U.S. 1, 5 (1958).

This position, moreover, is directly at odds with all of the Government's, and this Court's, earlier expressions with respect to efforts to justify price-fixing arrangements.

In *Citizen Publishing Co.* v. *United States,* 394 U.S. 131 (1969), as earlier noted, the Government responded to attempts to justify price-fixing and profit pooling arrangements as follows:

> "Appellants' argument thus amounts to a plea that business necessity can justify *per se* violations of the

57. Brief for the United States as *Amicus Curiae* at 21-22 n.18.

Sherman Act. Guided by considerations of effective antitrust enforcement, this Court (*see United States* v. *Trenton Potteries Co.,* 273 U.S. 392) has repeatedly declined to entertain such pleas in the past. No reason exists why it should apply a different approach here."[58]

• • •

"We do not attempt here to evaluate these conflicting economic and social views, and we do not believe the Court should do so. This Court has repeatedly rejected claims of ruinous competition or even improvement in distribution of a product as justifications for price-fixing, profit pooling, or market allocation agreements . . . . Congress has determined that the free play of economic forces is the best assurance of the allocation of resources to social advantage . . . . "[59]

The Government's view in *Citizen Publishing* is entirely consistent with the Court's recent admonition that courts are not at liberty to take a *per se* unlawful agreement out of that category on the ground that "because of the special characteristics of a particular industry, monopolistic arrangements will better promote trade and commerce than competition."[60] Neither, this Court reminded, is it for a court to evaluate "whether a policy favoring competition is in the public interest, or in the interest of members of an industry."[61]

If judgments are to be made that exceptions to the application of the Sherman Act may be in society's best interest (the avoidance of risks to public health and safety in *Professional Engineers,* the preservation of multiple

58. Brief for Respondent at 38, *Citizen Publishing, supra.*

59. *Id.* at 46-47 (citations omitted).

60. *Professional Engineers, supra,* 435 U.S. at 689.

61. *Id.* at 692.

news and editorial sources in *Citizen Publishing*, and, *arguendo*, the availability of as much music as possible in furtherance of the arts in the case of ASCAP and BMI), these judgments must be made by the Congress. *See Professional Engineers; Northern Pacific Railway; Trans-Missouri Freight*. As the Government is well aware, and has itself pointed out,[62] such exemptions have been enacted only where the *congressional* judgment has been that free market forces will produce unacceptable results for society.

Looking more closely at the Government's rationales for ignoring the *per se* rule which (presumably) would be applied in any other industry context, those rationales evaporate.[63] The Government hypothesizes that the blanket licenses offer users a new product (a pool of musical compositions) not available through individual copyright owners. Yet, television stations and other users do not perform a *pool* of compositions; they perform *individual* compositions and no persuasive reason has been advanced why those individual compositions should not be priced in a competitive marketplace. The Government's position is all the more extraordinary when one considers that this new "product" is the result of the elimination of competition, pure and simple.[64] To the extent that certain users

62. *See* Brief for Respondent at 44-45, *Professional Engineers, supra.*

63. It is noteworthy that the Government applies these rationales only to industries (radio and restaurants) not involved in the instant suit and as to which no record has been developed.

64. Even in those circumstances in which a new product was created by the combined resources of competitors, this Court has not permitted that factor to justify the elimination of competition between those competitors. *See, e.g., United States* v. *Topco Assoc.*, 405 U.S. 596, 610-611 (1972).

We also note that this Court has never permitted a pooling of *unrelated* copyrights or patents to be justified on the basis that a new

(footnote continued on next page)

may want immediate access to a large number of works, this fact alone certainly would not constitute justification for a licensing system which requires the fixing of prices in bulk for *all* compositions, regardless of their use or value.

The Government's second argument—that the blanket licenses reduce transaction costs—is again nothing other than an effort to justify the arrangements based on purported "market necessity." Such effort is impermissible. In any event, the proposition is open to serious question, at least with respect to the industry involved in this litigation—television. As discussed, the intent and effect of the blanket licenses as applied to local television stations has been not to *reduce* transaction costs, but to *increase* them dramatically. Mechanisms for the direct licensing of performance rights in pre-recorded programming already exist in connection with the producers' negotiations with individual copyright holders. The blanket licenses have displaced such a mechanism (and the competition which would result therefrom). Thus, the cost savings hypothesized by the Government are purely illusory.[65]

product was thereby created. *See Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 135 (1969); *United States* v. *Loew's Inc.*, 371 U.S. 38 (1962); *United States* v. *Masonite Corp.*, 316 U.S. 265, 276 (1942); *Ethyl Gasoline Corp.* v. *United States*, 309 U.S. 436, 459 (1940). The petitioners' blanket licenses do not involve a case resembling a pooling of *blocking* or *overlapping* patents as was considered in *Standard Oil Co.* v. *United States*, 283 U.S. 163 (1931).

65. Clearly, the purported "efficiencies" of the blanket licenses are "subordinate to the price fixing, and not the other way around." Bork, *supra*, at 268.

Conclusion

Precedent, as well as the dictates of sound antitrust enforcement, leads to the conclusion that the holding of the court of appeals should be affirmed, thus mandating the restoration of free competition in the licensing of music performance rights in place of the existing noncompetitive and *per se* unlawful blanket licensing system.

Respectfully submitted,

IRA M. MILLSTEIN
767 Fifth Avenue
New York, New York 10022
(212) 758-7800
Attorney for Amicus Curiae
All-Industry Television Music License Committee

Of Counsel:
ALAN J. WEINSCHEL
R. BRUCE RICH
ROGER B. KAPLAN
WEIL, GOTSHAL & MANGES

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